United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

NO.74-2020

No. 74-2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CLAUDIA FROST,

Plaintiff-Appellee,

v.

CASPAR WEINBERGER, Secretary of
Health, Education and Welfare,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

CARLA A. HILLS,
Assistant Attorney General,

DAVID G. TRAGER,
United States Attorney,

WILLIAM KANTER,
DAVID M. COHEN,
Attorneys, Appellate Section,
Civil Division,
Department of Justice,
Washington, D.C. 20530,
Phone: (202) 739-5325.

I N D E X

	Page
Questions Presented	1
Statement	2
1. The statute.	3
2. The facts.	5
Constitutional Provision Involved	11
Argument:	
I. The District Court Erred In Permitting This Suit To Be Maintained As A Class Action And In Refusing To Dismiss This Suit As Moot.	12
A. The Order of the District Court Permitting This Suit to be Maintained as a Class Action Was Inappropriate.	12
B. The District Court Erred in Not Dismissing this Suit as Moot.	15
II. The Pre-Reduction Procedures Established By The Secretary Are Constitutional.	21
A. The Role of the Secretary.	23
B. The Nature of the Recipients and the Possible Harm to Them.	26
C. The Nature of the Issues.	29
Conclusion	32
Certificate of Service	33

CITATIONS

Cases:

Arnett v. Kennedy, 416 U.S. 188	22-24,28
Astol Calero-Toledo v. Pearson Yacht Leasing, 42 U.S.L.W. 4693 (1974)	22
Bailey v. Patterson, 369 U.S. 31 (1962)	20
Bell v. Burson, 402 U.S. 535 (1971)	23,24,26

Cases (Cont'd.):	Page
Board of Regents v. Roth, 408 U.S. 564 (1972) -------	21
Euer v. New Rochelle Municipal Housing Authority, 479 F. 2d 1165 (C.A. 2, 1973) ----------	29
Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) ---	23
Committee to Free the Fort Dix 38 v. Collins, 429 F. 2d 807 (C.A. 3, 1970) ----------	19
Crow v. California Department of Human Resources Development, 490 F. 2d 580 (1973), petition for writ of certiorari filed December 28, 1973 ----	29
De Funis v. Odegaard, 416 U.S. 312 (1974) ----------	16,19
Eldridge v. Weinberger, 493 F. 2d 1230 (C.A. 4, 1974), petition for writ of certiorari filed, Sup. Ct. No. 74-205 ----------	28
Eisen v. Carlisle and Jacquelin, et al., 391 F. 2d 555 (C.A. 2, 1968), 42 U.S.L.W. 4804 (May 28, 1974) ----------	11,13
Fuentes v. Shevin, 407 U.S. 67 (1972) ----------	21,22,26,27
Geroci v. Freuchtlinger, 487 F. 2d 590 (C.A. 2, 1973) ----------	20
Goldberg v. Kelly, 397 U.S. 284 (1970) ----------	22-24,26-30
Golden v. Zwickler, 394 U.S. 103 (1969) ----------	18
Indiana Employment Security Division v. Burney, 409 U.S. 540 (1973) ----------	20
Johnson v. Georgia Highway Express, Inc., 417 F. 2d 1122 (C.A. 5, 1972) ----------	14
Jones v. United States Gas Improvement Co. (USDC ED Pa., No. 73-2485) ----------	20
Lucci v. Cahn, 493 F. 2d 826 (C.A. 2, 1973) ----------	20
Mills v. Richardson, 464 F. 2d 995 (C.A. 2, 1972) ----	29
Mitchell v. W. T. Grant Co., 42 U.S.L.W. 4671 (May 14, 1974) ----------	21,26,28,28-30

Cases (Cont'd.): Page

Morrissey v. Brewer, 408 U.S. 471 (1972) ---------- 21

North Carolina v. Rice, 404 U.S. 244 (1971) --------- 16

Oil Workers Union v. Missouri, 361 U.S. 363 (1960) -- 16,18

O'Shea v. Littleton, 414 U.S. 488 (1974) ---------- 20

Perry v. Sinderman, 408 U.S. 564 (1972) ---------- 21

Richardson v. Griffin, 346 F. Supp. 1226 (D. Md.), affirmed, 409 U.S. 1069 (1972) ---------- 2,5,7

Richardson v. Perales, 402 U.S. 389 (1971) ---------- 23,24,29,31

Richardson v. Ramirez, 42 U.S.L.W. 5016 (June 24, 1974) ---------- 20

Richardson v. Wright, 405 U.S. 208 (1972) ---------- 29

Schneider v. Selective Service System, 470 F. 2d 73 (C.A. 7), certiorari denied, 409 U.S. 1085 (1973) ---------- 14

Sniadach v. Family Finance Corp., 395 U.S. 237 (1969) ---------- ---------- 26

Torres v. New York State Department of Labor, 318 F. Supp. 1313 (S.D. N.Y., 1970), 321 F. Supp. 432 (S.D. N.Y., 1970), vacated, 402 U.S. 968 (1971), adhered to, 333 F. Supp. 341 (S.D. N.Y., 1971), affirmed, 405 U.S. 949 (1971), rehearing denied, 410 U.S. 971 (1973) ---------- 19,20,24-27

United Public Workers of America v. Mitchell, 330 U.S. 75 (1947) ---------- 18

United States v. W. T. Grant Co., 345 U.S. 629 ------ 18

Village of Belle Terre, et al. v. Boraas, 416 U.S. 1 ---------- 18

Yaffey v. Powers, 454 F. 2d 1362 (C.A. 1, 1972) ----- 14

Zeilstra v. Tarr, 466 F. 2d 111 (C.A. 6, 1972) ------ 14

Constitution, Statutes and Rules: Page

Fifth Amendment to the Constitution of the United States ---------- 11

Title II of the Social Security Act:

42 U.S.C. 402 ---------- 1,2
42 U.S.C. 402(d)(1) ---------- 3,5
42 U.S.C. 402(d)(1)(D) ---------- 3
42 U.S.C. 402(d)(1)(E) ---------- 3
42 U.S.C. 402(d)(1)(F) ---------- 3
42 U.S.C. 402(d)(1)(G) ---------- 3
42 U.S.C. 402(d)(2) ---------- 3,5
42 U.S.C. 403(a) (1964) (Supp. V) ---------- 3,4
42 U.S.C. 403(d)(3) (1964) ---------- 4
42 U.S.C. 403(f) (1970) (Supp. II) ---------- 27
42 U.S.C. 405(g) ---------- 8
42 U.S.C. 414(a) ---------- 3
42 U.S.C. 415 ---------- 3
42 U.S.C. 416(h)(2)(A) (1964) ---------- 4
42 U.S.C. 416(h)(2)(B) (1964) ---------- 4
42 U.S.C. 416(h)(3) (1964) (Supp. II) ---------- 4
42 U.S.C. 416(i) ---------- 28

Federal Rules of Civil Procedure:

Rule 23(b)(2) ---------- 10,12,13
Rule 23(b)(3) ---------- 13
Rule 23(c)(2) ---------- 13
Rule 59 ---------- 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-2020

CLAUDIA FROST,

Plaintiff-Appellee,

v.

CASPAR WEINBERGER, Secretary of
Health, Education and Welfare,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

QUESTIONS PRESENTED

1. Whether the district court correctly permitted this suit to be maintained as a class action.

2. Whether the district court erred in refusing to dismiss this suit as moot.

3. Whether the administrative procedures governing the reduction in survivors' benefits under Title II of the Social Security Act, 42 U.S.C. 402, under which,

prior to reduction, a beneficiary is provided with a summary of the evidentiary basis for the proposed reduction and an opportunity to submit additional evidence and a written rebuttal, but not an oral hearing, are constitutional.

STATEMENT

Plaintiffs instituted this action in the district court seeking, inter alia, to enjoin the Secretary of Health, Education and Welfare from reducing their monthly Social Security payments[1/] without affording them a prior oral hearing. During the pendency of the proceedings below, and at the direction of the district court, the Secretary granted plaintiffs an oral hearing after which he reaffirmed the previously ordered reductions in plaintiffs' monthly benefits.

Thereafter, the district court, while recognizing that there was no remaining issue in this case as to the named plaintiffs, nonetheless granted plaintiffs' motion to maintain a class action and declared invalid the Secretary's procedures for reducing survivors' benefits on the

---

1/ Plaintiffs are the surviving wife and two legitimate children of the deceased wage-earner Charles E. Frost, Jr. They receive survivors' benefits under the provisions of Section 202 of the Act, 42 U.S.C. 402. As we explain more fully, infra, pp. 3-7, the reductions ordered in plaintiffs' benefits were necessary so as to permit payments to two illegitimate children of the wage earner who became entitled to share equally in the family's monthly benefits as the result of the Supreme Court's decision in Richardson v. Griffin, 409 U.S. 1069 (1972).

ground that they failed to afford a pre-reduction oral evidentiary hearing. The court also ordered the Secretary to adopt new procedures in conformity with its declaration "as soon as practically convenient". Subsequently, the court denied the Secretary's motion under Rule 59 F. R. Civ. P. to deny class action status to this case and to dismiss the cause as moot.

The Secretary appeals.

1. The statute. Pursuant to 42 U.S.C. 402(d)(1), (d)(2), each dependent child of an individual who dies a fully insured individual[2/] under Title II of the Social Security Act (Federal Old-Age, Survivors and Disability Insurance Benefits) is entitled to receive a monthly payment for a specified period[3/] equivalent to one-half[4/] of the primary insurance amount[5/] of the deceased individual. In no case, however, may the total amount of benefits received by a family exceed a specified maximum. 42 U.S.C. 403(a) 1964).

Prior to 1965, the only children eligible for benefits pursuant to this provision were children who could inherit from the decedent pursuant to state law governing intestate

---

2/ As defined in 42 U.S.C. 414(a).

3/ Specified in 42 U.S.C. 402(d)(1)(D), (E), (F), (G).

4/ In some circumstances, the amount is equivalent to three-fourths of the primary insurance amount. 42 U.S.C. 402(d)(2).

5/ As defined in 42 U.S.C. 415.

succession or children whose parents participated in a marriage ceremony resulting in a purported marriage which, but for one of two specified legal impediments, would have been a valid marriage. 42 U.S.C. 416(h)(2)(A), (B) (1964); 42 U.S.C. 403(d)(3) (1964).

In 1965, Congress amended the Act so as to expand the definition of an eligible child to include illegitimate children under specified circumstances in addition to those specified in the Act prior to 1965. 42 U.S.C. 416(h)(3) (1964) (Supp. II).

Congress again amended the Act in 1968. Although the definition of an eligible child was not changed, the provisions concerning the maximum total benefit payable were amended so as to provide that where the total benefits payable to all eligible dependents of the wage-earner, including illegitimate children (rendered eligible for benefits by the 1965 amendments), exceeded the maximum permitted by law, any reduction in total benefits paid to the wage-earner's family should first occur in the benefits payable to those illegitimate children who were rendered eligible by the 1965 amendments. 42 U.S.C. 403(a) (1964) (Supp. V). Reductions in the benefits payable to the surviving wife and legitimate children were to occur, if, and only if, after the reduction in the benefits payable to the illegitimate children (as defined in 42 U.S.C. 416(h)(3)), the total benefits payable would still be higher

than the maximum permitted (ibid.). The effect of this amendment was to exclude illegitimate children rendered eligible for benefits by the 1965 amendments from any benefits if the benefits payable to the wife and legitimate children of the wage-earner exhausted the maximum payment to the family permitted by law. See Griffin v. Richardson, 346 F. Supp. 1226 (D. Md.), affirmed, 409 U.S. 1069 (1972).

2. The facts. Plaintiff Claudia Frost was the wife of Charles Frost, Jr., a fully insured individual under Title II. They had two children, the other two plaintiffs, James and Kristen Frost (App. p. 6).

Charles Frost died on August 21, 1968, and plaintiff applied for mother's insurance benefits on August 26, 1968 (App. pp. 6,98). In her application, plaintiff stated that she had been separated from Charles Frost for three years prior to his death but that no divorce had been obtained (App. p. 100). Plaintiff stipulated that two children, James and Kristen, were eligible for survivors' benefits and that they had not been living with the decedent at the time of his death (App. p. 101). James and Kristen began receiving survivors' benefits pursuant to 42 U.S.C. 402(d)(1), (2), in the year in which the applications were filed (App. p. 6).

On August 26, 1968, Lola Coolidge Frost also filed an application for benefits (App. p. 101). In the application for Child's Insurance Benefits, the applicant

indicated that the decedent was the father of one child, Charles E. Frost, III and that she was expecting another child fathered by the decedent (App. p. 101). Lola Frost stated that she had not been married to the decedent (App. p. 101).

Lola Coolidge Frost filed another application for benefits indicating that in addition to Charles Frost, III, another child, Tina, also fathered by the decedent, had been born after his death (App. p. 101).

Plaintiff was apparently notified of the applications filed by Lola Coolidge Frost in May of 1969. (App. p. 27). She was informed that her husband was named as the father on the birth certificates of Charles E. Frost, III and Tina L. Frost (App. p. 73). Plaintiff was requested to provide any evidence which would tend to demonstrate that Charles Forst, Jr., was not the father of these two children. Plaintiff replied that she was aware of the fact that Charles Frost had been living with Lola Coolidge but that she was unaware of the existence of any children (App. p. 73).

Although Charles E. Frost and Tina L. Frost had been rendered eligible for survivors' benefits by the 1965 amendments to the Act, apparently the payment of benefits to Claudia Frost and her two children James and Kristen Frost exhausted the family maximum, thus precluding any payment to Charles and Tina pursuant to the 1968 amendment.

In 1972, the Supreme Court affirmed the decision of the three-judge court in Griffin v. Richardson, supra, which struck down the 1968 amendment as unconstitutional. Richardson v. Griffin, 409 U.S. 1069 (1972).

Since the Court did not disturb the maximum limitation imposed by the Act upon the total benefits payable, the effect of the decision was to require a reduction in the payment made to the wife of the wage-earner and to legitimate children, such as James and Kristen, in those cases in which, given the maximum, the 1968 amendments had effectively precluded the payment of benefits to illegitimate children.

The Social Security Administration (SSA) established a procedure for the implementation of the decision in Griffin.[6/] Pursuant to this procedure, those individuals, such as plaintiffs who were receiving benefits which would be reduced as a result of the decision, were notified of the decision of the forthcoming reduction to be made in the monthly payments they would be receiving (App. p. 69). The notice was to specify the amount of the forthcoming reduction as well as a summary of the evidence, such as the birth certificates of Charles and Tina, upon which SSA intended to rely in making the reduction (App. pp. 69-70). No action was to be taken to implement the proposed

---

6/ The SSA procedures are set forth in the Appendix, pp. 55-72.

reduction for 45 days pending receipt from the recipient of any protest and/or additional evidence (App. p. 58).

If the protest is accompanied by sufficient documentary evidence to cast doubt upon the validity of the proposed reduction, the reduction is postponed (App. pp. 61-2). If, however, the recipient did not contest the proposed reduction or if the evidence by the recipient failed to indicate that the reduction should not be instituted, the reduction was put into effect without further pre-reduction proceedings. However, claimant was thereafter entitled to request reconsideration of the reduction (App. p. 62). If, upon reconsideration, the initial determination was affirmed, the claimant was entitled to request a hearing and, if after a hearing the claimant was not satisfied, he could appeal to the Appeals Council (App. p. 13). If the Appeals Council affirmed the determination, the claimant could seek judicial review pursuant to 42 U.S.C. 405(g).

Notice of a forthcoming reduction in the payments to Claudia and her two children, James and Kristen, was sent to Mrs. Frost on February 15, 1973 (App. p. 73). The notice indicated that the reduction resulted from the decision of the Supreme Court in Griffin and the fact that SSA had determined that Charles Frost, Jr., was the father of two illegitimate children, Charles E. and Tina L. Frost, who had also applied for benefits. Upon inquiring into the matter, Mrs. Frost

was allegedly informed that, in order to contest the decision, she would be required to file a written request for reconsideration and to submit evidence which would rebut the evidence upon which SSA intended to rely.[7/]

Mrs. Frost requested reconsideration[8/] and in May, 1973, she was informed that, upon reconsideration, the decision to reduce the benefits payable to plaintiffs was affirmed (App. p. 13).

Mrs. Frost requested a hearing but before one could be held she filed this suit on her own behalf, on behalf of James and Kristen, and on "behalf of all persons who now or may in the future be entitled to survivors' benefits under the [Social Security] Act whose benefits have been or may be reduced without a prior hearing" (App. p. 5). Plaintiffs sought declaratory and both temporary and permanent injunctive relief (App. pp. 11-12).

After a hearing on the motion for a temporary restraining order, the district court denied the motion without prejudice and ordered the Secretary to conduct an administrative hearing within one month of the date of the order (App. p. 47-48).

7/ Mrs. Frost contended that she requested an opportunity to examine the evidence upon which SSA premised its decision but that the request was denied (App. p. 8).

8/ It is not clear whether this request was a "contest" or whether that stage was bypassed.

Pursuant to the district court's order, the Secretary conducted an administrative hearing, after which the administrative law judge determined that the decision to reduce benefits payable to plaintiffs was correct (App. pp. 98-104).

Subsequently, both plaintiffs and the Secretary moved for summary judgment. The plaintiffs contended that the failure to accord a pre-reduction hearing was unconstitutional under the Fifth Amendment to the Constitution (App. pp. 75-79). The Secretary contended, inter alia, that the suit was not properly maintainable as a class action, that the suit was moot, and that, in any event, the procedures established by the Secretary were constitutional (App. p. 52).

The district court rejected the Secretary's contentions and granted plaintiffs' motion for summary judgment (App. p. 148). The court held that the suit could be maintained as a class action pursuant to Fed. R. Civ. Pro. 23(b)(2) (App. pp. 8-12). In addition, although the court noted that "nothing" remained left to adjudicate as to the representative plaintiff and that "plaintiffs no longer have a personal stake in the outcome of the decision rendered by * * * the court", the court held that the suit was not moot (App. pp. 120-24, 144). Finally, on the merits, the court held that the failure to accord a pre-reduction hearing to the class represented by the plaintiffs was unconstitutional (App. pp. 127-143).

Although the court denied the plaintiffs' motion for injunctive relief, the court granted the plaintiffs' motion for declaratory relief and ordered the Secretary to adopt new procedures which conformed to the dictates of the judgment as soon as "practically convenient" (App. p. 148).

Subsequent to the entry of the judgment, the Secretary moved to amend the judgment on the basis of Eisen v. Carlisle and Jacquelin, et al., 42 U.S.L.W. 4804 (May 28, 1974), so as to deny class action status to the suit and to thereupon dismiss the complaint as moot (App. p. 149). This motion was denied on July 1, 1974 (App. p. 156).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution in relevant part provides:

> No person shall be . . . deprived of . . . property without due process of law.

ARGUMENT

We demonstrate in Point I that the district court order permitting this suit to be maintained as a class action must be set aside (Point A) and that the district court erred in holding that this case is not moot (Point B). We demonstrate in Point II that assuming the district court did not err in this regard, the procedures established by the Secretary are constitutional.

I.

THE DISTRICT COURT ERRED IN PERMITTING THIS SUIT TO BE MAINTAINED AS A CLASS ACTION AND IN REFUSING TO DISMISS THIS SUIT AS MOOT.

A. The Order of the District Court Permitting This Suit to be Maintained as a Class Action Was Inappropriate.

The plaintiffs in this suit requested the district court to permit this suit to be maintained as a class action (App. p. 32), but failed to provide notice to members of the proposed class. The district court granted this motion at the same time it granted the plaintiffs' motion for summary judgment, holding that the suit could be maintained as a class action pursuant to Rule 23(b)(2),[9/] Fed. R. Civ. Pro. (App. p. 116-120).

9/ Rule 23(b)(2) provides that a cause may be maintained as a class action if:

> (b)(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.

(continued on next page)

In failing to require the plaintiffs to afford notice to other members of the purported class the district court erred. Eisen v. Carlisle and Jacquelin, 42 U.S.L.W. 4804 (May 28, 1974).[10] In that case, the Supreme Court held that notice is made mandatory by Rule 23(c)(2) in class actions for money judgments instituted pursuant to Rule 23(b)(3), Fed. R. Civ. Pro.[11]

This Court has held that notice in all class actions, including those, such as the instant one, instituted pursuant to Rule 23(b)(2), is a constitutional requirement. Thus, in Eisen v. Carlisle and Jacquelin, 391 F. 2d 555, 564 (C.A. 2, 1968), the plaintiff contended that notice was not mandatory in a class action under Rule 23(b)(2). This Court rejected this contention and held that:

> * * * notice is required as a matter of due process in all representative actions, and 23(c)(2) merely requires a particularized form of notice in 23(b)(3) actions. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950). Advisory Committee's Note at 107. [391 F. 2d at 564-65]

9/ (continued) Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages". Advisory Committee's Note, 39 F.R.D. 102.

10/ The Secretary in his motion to alter or amend the judgment brought this matter to the attention of the court (App. p. 149), without result (App. p. 156).

11/ The Court's ruling reflects that its strict construction of Rule 23(c)(2) is based substantially on considerations of due process. 42 U.S.L.W. at 4809.

See, also, Zeilstra v. Tarr, 466 F. 2d 111, 113 (C.A. 6, 1972); Schoeder v. Selective Service System, 470 F. 2d 73 (C.A. 7), certiorari denied, 409 U.S. 1085 (1973); Contra, Johnson v. Georgia Highway Express, Inc., 417 F. 2d 1122 (C.A. 5, 1972); Yaffey v. Powers, 454 F. 2d 1362 (C.A. 1, 1972).

The wisdom of this holding is well illustrated by this case. Plaintiffs' complaint presents a question of substantial importance to a great many individuals who receive survivors' benefits under Title II of the Social Security Act. These individuals should not be bound, without notice and consent, by a decision in one case involving only three of the many thousands of beneficiaries.

Given the decisions of this Court and of the Supreme Court, it is clear that the district court's order denies due process to the members of the class, by reason of the lack of notice informing them that their rights will be determined by this lawsuit. Therefore, the order must be declared invalid, with plaintiffs remaining as the sole litigants affected by this Court's judgment.[12/]

12/ As we discuss more fully infra, pp. 20-21, the class action must fail here for the additional reason that, since the cause became moot as to the named plaintiffs, there was no proper class representative before the court.

B. The District Court Erred in Not Dismissing this Suit as Moot.

1. As we have demonstrated above, the district court's order permitting this suit to be maintained must be set aside. Plaintiffs thus remain as the sole litigants.

Plaintiffs instituted this suit after reconsideration[13/] of the initial decision that Charles E. and Tina L. Frost were entitled to share the benefits payable to the surviving family members of Charles Frost, Jr.

Plaintiffs requested a hearing as provided in the procedures established by the Secretary but, before the hearing could be conducted, they instituted this suit (App. p. 28) seeking, inter alia, a temporary restraining order (App. p. 12). The district court denied the motion for a temporary restraining order, without prejudice, and ordered the Secretary to conduct a hearing (App. pp. 47-8).

Pursuant to the court's order, the Secretary conducted a hearing. Accordingly, as the district court stated, the "* * * plaintiffs no longer have a personal stake in the outcome of the decision rendered by * * * [the] court" (App. p. 144), and "* * * nothing remains left for the individual plaintiffs to adjudicate" (App. p. 144). Under these circumstances, the district court erred in refusing to dismiss the suit as moot.

13/ See note 8 , supra.

Article III of the Constitution demands that federal courts exercise jurisdiction only in cases or controversies. De Funis v. Odegaard, 416 U.S. 312 (1974). As noted by the Court in North Carolina v. Rice, 404 U.S. 244, 246 (1971):

> to be cognizable in a federal court, a suit 'must be definite and concrete, touching the legal relations of parties having adverse legal interests * * *. It must be a real and substantial controversy admitting of specific relief through a decree of conclusive character, or distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' [Quoting Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 240-41 (1937).]

Thus, federal courts decline to entertain suits when the parties are not adverse, when the controversy is hypothetical, or when the court cannot grant the relief requested.[14/]

Here, it is clear, on the district court's own admission (App. p. 144), that nothing remains to be adjudicated with respect to the plaintiffs. Since there is no actual case or controversy, the court, therefore, erred in refusing to dismiss the case as moot.

The fact that there is a possibility that the plaintiffs' benefits might be reduced in the future without a pre-reduction hearing does not prevent the case from becoming moot. In Oil Workers Union v. Missouri, 361 U.S.

14/ A controversy must exist at all stages of a court's consideration, not merely at the time the action is initiated. De Funis v. Odegaard, supra, at 317.

363 (1960), the Court was asked to decide the legality of a Governor's seizure of a public utility under a State statute -- alleged to be unconstitutional -- which authorized such seizure. When the case reached the Supreme Court, the seizure had terminated and the State Court injunction against a strike in violation of the statute had expired. The Supreme Court held the case moot:

> [T]he duty of this Court 'is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.' Mills v. Green, 159 U.S. 651, 653.
>
> * * * * *
>
> Any judgment of ours at this late date 'would be wholly ineffectual for want of a subject matter on which it could operate. An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other. To adjudicate a cause which no longer exists is a proceeding which this Court uniformly has declined to entertain.' Brownlow v. Schwartz, 261 U.S. 216, 217-218.

361 U.S. at 367, 371. Similarly here, neither the district court nor this Court is in a position to issue "a judgment which can be carried into effect". Here too any judgment "would be wholly ineffectual for want of a subject matter on which it could operate". The only further judgment that can now be entered in this case would be to "require

something to be done which had already taken place". Thus here, as in Oil Workers Union v. Missouri, supra, the appeal has become moot. See Golden v. Zwickler, 394 U.S. 103 (1969). See also Village of Belle Terre, et al. v. Boraas, 416 U.S. 1, 10-12 (Brennan, J., dissenting).

Similarly, in United Public Workers of America v. Mitchell, 330 U.S. 75, 89-90 (1947), the Supreme Court held that:

> The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arise only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough.

Therefore, since all that remains in this case is the mere possibility that at some time in the future the plaintiffs might be subject to a reduction in benefits without a prior hearing, there is no "specific live grievance" and the case is moot.

Plaintiffs cannot rely upon the principle that voluntary cessation of illegal conduct by a defendant does not render a case moot. United States v. W. T. Grant Co., 345 U.S. 629. The primary reason for this exception is that the application of the mootness principle in such circumstances would give defendants a powerful weapon against public law enforcement. Since this reason is not present when the Government is the defendant, the exception has been held to have but limited application to the United

States. Committee to Free the Fort Dix 38 v. Collins, 429 F. 2d 807, 812 (C.A. 3, 1970). Moreover, this exception was intended to prevent a defendant from rendering a case moot by his own conduct. There was no intent upon the part of the Government to grant plaintiffs a hearing in order to moot this case. The hearing was conducted pursuant to the order of the district court within the time specified in that order.

Moreover, plaintiffs cannot rely upon the principle that issues which are capable of "repetition, yet evading review" will not be considered moot. De Funis v. Odegaard, supra, 416 U.S. at 318-19. The Secretary has not changed his procedures, and "there is no reason to suppose that a subsequent case attacking those procedures" would not be judicially resolved. Ibid.

In support of its holding on the question of mootness, the district court considered Torres v. New York State Dep't of Labor, 318 F. Supp. 1313 (S.D. N.Y., 1970),[15/] as dispositive (App. p. 121-2). But, that case is not controlling. As the court in Torres noted, that case was not moot

> for the significant reason that Torres has requested the restoration of the

---

15/ Subsequent to the order reported in 318 F. Supp., a three-judge court was convened to determine the merits. Torres v. New York State Dep't of Labor, 321 F. Supp. 432 (S.D. N.Y., 1970), vacated, 402 U.S. 968 (1971), adhered to 333 F. Supp. 341 (S.D. N.Y., 1971), affirmed, 405 U.S. 949 (1971), rehearing denied, 410 U.S. 971 (1973).

> unemployment insurance benefits which were withheld prior to his hearing. [318 F. Supp. at 1316]

Plaintiffs have made no such claim here.

2. Moreover, even if, contrary to our contention under the Eisen holdings,[16] the district court properly permitted this suit to be maintained as a class action, the case is moot as to the only named representatives of the class, and the case should thus have been dismissed as moot. As the Supreme Court recently stated in O'Shea v. Littleton, 414 U.S. 488, 494 (1974):

> * * * if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.

See, Lucci v. Cahn, 493 F. 2d 826 (C.A. 2, 1974); Geroci v. Freuchtlinger, 487 F. 2d 590 (C.A. 2, 1973) (per curiam). See, also, Indiana Employment Security Division v. Burney, 409 U.S. 540 (1973); Bailey v. Patterson, 369 U.S. 31, 32-33 (1962); Jones v. United States Gas Improvement Co., U.S.D.C., E.D. Pa., No. 73-2485. Cf., Torres v. New York State Dep't of Labor, 410 U.S. 971, 973-974 (on petition for rehearing) (Mr. Justice Marshall dissenting); Richardson v. Ramirez, 42 U.S.L.W. 5016, 5020 (June 24, 1974).

16/ See, pp. 12-14, supra.

Here, as the district court admitted, there is no longer any matter remaining to be adjudicated between the only named plaintiffs and the defendant (App. p. 144). Accordingly, even if this suit is properly maintainable as a class action, it should have been dismissed as moot.

II.

THE PRE-REDUCTION PROCEDURES ESTABLISHED BY THE SECRETARY ARE CONSTITUTIONAL.

The district court held that, under the Constitution, the plaintiffs were entitled to an oral hearing prior to a decision by the Secretary to reduce the survivors' benefits received by them pursuant to Title II of the Social Security Act (App. pp. 127-43). Assuming that the court properly reached the merits of that issue in this case, we now show that the district court erred.

As the Supreme Court has often noted, "due process is flexible and calls for such procedural protections as the particular situation demands". Morrissey v. Brewer, 408 U.S. 471, 481 (1972), and cases cited therein. Thus, it is settled that such questions as whether an individual possesses a "property" interest protected by the Constitution (compare, Perry v. Sinderman, 408 U.S. 564 (1972) with Board of Regents v. Roth, 408 U.S. 564 (1972)), whether the Constitution requires a hearing prior to a deprivation of this "property" (compare, Fuentes v. Shevin, 407 U.S. 67 (1972) with Mitchell v. W. T. Grant Co., 42 U.S.L.W. 4671 (May 14, 1974)), and, if so, what type of hearing is

required (see, e.g., Goldberg v. Kelly, 397 U.S. 284 (1970)), are questions which can only be answered by reference to a number of factors which must be weighed in the circumstances of the particular case. See, e.g., Arnett v. Kennedy, 416 U.S. 134, 187 (White, J., concurring in part and dissenting in part).

Here, it is clear that the statutory right of the plaintiffs to the receipt of survivors' benefits is a property right protected by the Constitution. See Goldberg v. Kelly, supra. We are prepared to concede that given this property interest, plaintiffs are entitled to some type of hearing prior to a reduction in those benefits. See, Fuentes v. Shevin, supra, 407 U.S. at 88-90. The special circumstances which would permit the Secretary to dispense with any form of a pre-reduction hearing are not present here. See, e.g., Astol Calero-Toledo v. Pearson Yacht Leasing, 42 U.S.L.W. 4693 (1974).

Assuming, therefore, that the plaintiffs here are entitled to a pre-reduction hearing, the only question presented relates to the nature of the hearing which must be provided, i.e., whether the procedures established by the Secretary providing for an oral hearing only after a reduction in benefits is constitutionally permissible.

The only unqualified statement which can be made concerning this question is that the pre-reduction hearing must be "appropriate to the nature of the case". Bell v.

Burson, 402 U.S. 535, 541-542 (1971). The specific answer to the question as to whether the particular procedures at issue here are adequate thus can be found only by reference to a variety of factors. See, Arnett v. Kennedy, supra, 416 U.S. at 188-192 (White, J., concurring in part and dissenting in part). For convenience, we discuss these factors separately.

A. The Role of the Secretary.

As the Supreme Court noted in Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961):

> Considerations of what procedures due process may require under any given circumstances must begin with a determination of the precise nature of the governmental function involved * * *.

See, also, Goldberg v. Kelly, supra, 397 U.S. at 262-263; Richardson v. Perales, 402 U.S. 389, 402 (1971).

Here, it is clear that the Secretary acts as the administrator of a vast system providing statutory payments to millions of beneficiaries, see, e.g., Richardson v. Perales, supra, and that the cost of administering this program can be very large indeed.

To require the Secretary to conduct a pre-reduction oral hearing in every case would increase the administrative costs of the program without a concomitant increase in the benefits awarded. If a beneficiary could delay the reduction merely by requesting a hearing, many beneficiaries who do not now request a hearing could be expected to

do so, not because they necessarily believe the Secretary to be in error, but solely to obtain a delay in the reduction. The conduct of these additional hearings, which would thus become almost automatic in many instances, would obviously increase the cost of administering the program.

While we recognize that the increased cost which would result if the district court's decision is affirmed is not determinative, see Goldberg v. Kelly, supra, it is a factor, and an important one, which must be taken into account in the context of this social security program. See, e.g., Richardson v. Perales, supra, 402 U.S. at 400; Bell v. Burson, supra, 402 U.S. at 540; see, also, Arnett v. Kennedy, supra, 416 U.S. at 167-168 (Powell, J., concurring); Torres v. New York State Dep't of Labor, 321 F. Supp. 432, 437 (S.D. N.Y., 1971), vacated, 402 U.S. 968 (1971), adhered to, 333 F. Supp. 341 (S.D. N.Y., 1971), affirmed, 405 U.S. 949 (1971), rehearing denied, 410 U.S. 971 (1973).

Moreover, it is important to note that, as administrator of the program, the Secretary does not function as an adversary of the recipients or as one advocating either a reduction or a non-reduction of the benefits they receive. See Richardson v. Perales, supra, 402 U.S. at 403. Rather the Secretary's role is more in the nature of a stakeholder. As such, in making a determination to reduce benefits prior

to a full-scale oral hearing, the Secretary is not seeking to reduce his liability but merely to apportion the funds admittedly owing.

Moreover, because his role is in the nature of a stakeholder, the Secretary, like the creditor in Mitchell v. W. T. Grant, supra, stands ready to repay recipients for lost benefits if, after a full-scale hearing, he determines that the decision to reduce benefits was erroneous. See Torres v. New York State Dep't of Labor, 321 F. Supp. 432, 438 (S.D. N.Y., 1971), vacated, 402 U.S. 965 (1971), adhered to, 333 F. Supp. 341 (S.D. N.Y., 1971), affirmed, 405 U.S. 949 (1971), rehearing denied, 410 U.S. 971 (1973).

Finally, it is important to note that the Secretary, in his role as stakeholder, recognizes his obligation to treat recipients fairly lest he make an erroneous decision. Thus, the procedures he has established do not abruptly withhold benefits without giving the recipient an opportunity to respond. There are no immediate reductions when the Secretary initially determines that a reduction is required. Rather, no reduction is implemented for 45 days in order to afford the beneficiary an opportunity to respond and, if the beneficiary does submit evidence which indicates that a reduction should not be implemented, the reduction is indefinitely postponed pending a determination. If a reduction is indeed imposed, the beneficiary

may request a full-scale oral hearing and reconsideration, see Mitchell v. W. T. Grant, supra, and may prosecute appeals to the Appeals Council and to the courts. These safeguards insure the system's fairness and prevents the reduction process from imposing severe burdens upon those beneficiaries whose benefits are to be reduced.

B. The Nature of the Recipients and the Possible Harm to Them.

In determining the nature of the hearing which must be conducted prior to a reduction in benefits and a full-scale hearing, the role of the Secretary and his ability and willingness to repay benefits lost due to an erroneous initial decision must be weighed against the harm which would be experienced by the recipients due to an erroneous initial decision. See Goldberg v. Kelly, supra; Sniadach v. Family Finance Corp., 395 U.S. 237 (1969); Bell v. Burson, supra; Torres v. New York State Dep't of Labor, supra. Compare Fuentes v. Shevin, supra, with Mitchell v. W. T. Grant Co., supra.

The district court recognized this fact (App. p. 131), and held, relying upon Goldberg v. Kelly, supra, that, since the recipients possess a "brutal need" for the benefits at issue, they were entitled to a full-scale hearing prior to a reduction of those benefits (App. pp. 131-32).

However, the district court did not accord sufficient weight to the differences between the benefits at issue here and those at issue in Goldberg.

In Goldberg, the welfare benefits at issue were awarded upon the basis of need and represented the last remaining source of income available to the recipients. The benefits payable to dependents under Title II of the Social Security Act are not based upon need but represent a statutory payment available regardless of need. Moreover, while the benefits are a component, in some cases, a major component (App. p. 132) of the income received by the beneficiaries, the benefits do not, as the district court admitted (App. p. 132), represent their sole source of income.[17/] Finally, it is important to note that, here, unlike Goldberg, a complete termination of benefits is not at issue, and that, as the court noted in Torres, supra,[18/] the benefits at issue here do not represent the last remaining source of the income necessary for

---

17/ We note that a mother receiving benefits on her own behalf and on behalf of her children, may earn up to a statutory maximum without a reduction in her benefits. 42 U.S.C. 403(f), as amended, 42 U.S.C. 403(f) (1970 Supp. II). Moreover, whether or not she is receiving benefits, in no case do her earnings result in a reduction of the benefits received by the children.

18/ The district court attempted to distinguish Torres, by noting that it had been decided before Fuentes v. Shevin, supra. App. p. 143. But Fuentes merely held that "brutal need" was not necessarily relevant to the question as to whether any hearing was required at all. The Court in Fuentes specifically noted that the question of need remained important in determining the type of hearing required. Fuentes v. Shevin, supra, 407 U.S. at 89 fn. 20, 90 fn. 21.

survival available to the recipients. See Arnett v. Kennedy, 416 U.S. 134, 168 (Mr. Justice Powell, concurring (1974)).

In light of these differences between the benefits involved here and those involved in Goldberg, it is clear that, in terms of the consequences felt by the recipients, the risk of an erroneous decision here is no where as great as they were in Goldberg. See, e.g., Mitchell v. W. T. Grant Co., supra.[19/]

Moreover, it is clear that, because survivors' benefits are not payable upon the basis of need, there is no basis for a presumption here, as there was in Goldberg, supra, that recipients of survivor benefits will find a written pre-reduction hearing beyond their abilities. Indeed, there is no reason to suppose that recipients of survivor benefits will be any less educated than the population at large and that they will be unable to participate

---

19/ For similar reasons, this case may be distinguished from Eldridge v. Weinberger, 493 F. 2d 1230 (C.A. 4, 1974), petition for writ of certiorari filed, Sup. Ct. No. 72-204; Williams v. Weinberger, 494 F. 2d 1191 (C.A. 5, 1974), petition for writ of certiorari filed, Supt. Ct. No. 74-205. Those cases involved the question of whether an oral hearing was required prior to the termination of the claimant's disability benefits. Here, unlike the situation in Eldridge and Williams, the claimants' benefits are reduced but not terminated and, here, unlike the situation in Eldridge and Williams, the claimants are not, by definition, unable to work, see 42 U.S.C. 416(i), or unable to locate employment. See Goldberg v. Kelley, supra.

in a written pre-reduction hearing in a meaningful manner.[20/] See, Richardson v. Wright, 405 U.S. 208, 218 (1972) (Brennan, J., dissenting).

C. The Nature of the Issues.

The ability of the recipient to participate in a written hearing is also relevant to the question of the nature of the issues to be decided at the pre-reduction hearing. See Richardson v. Perales, supra, 402 U.S. at 407; Goldberg v. Kelly, supra, 397.U.S. at 268, fn. 15; Mitchell v. W. T. Grant Co., supra, 42 U.S.L.W. at 4674, See, also Buer v. New Rochelle Municipal Housing Authority, 479 F. 2d 1165, 1164 (C.A. 2, 1973); Mills v. Richardson, 464 F. 2d 995 (C.A. 2, 1972); Crow v. California Department of Human Resources Development, 490 F. 2d 580 (1973), petition for writ of certiorari filed December 28, 1973.

Survivors' benefits are based upon a statutory entitlement and the question of the amount of the benefits involved are far more susceptible of documentary proof than were the issues presented in Goldberg. Indeed, the very issues presented by plaintiffs here illustrate this fact. Aside from contending that her husband had told her that he had been rendered impotent at the time he left her -- two years prior to the birth of Charles E. Frost III to Lola Coolidge -- the only basis upon which Mrs. Frost contests the right of

---

20/ Of course, there is nothing to prevent a beneficiary from seeking the assistance of counsel in the preparation of his written response.

Charles and Tina Frost to benefits is that New York law requires the consent of the father of an illegitimate child prior to the placement of his name as father on the child's birth certificate and no consent of the decedent had been demonstrated. The hearing officer specifically requested plaintiffs' counsel to submit written argument on this point since it was far more susceptible to written argument than it was to oral argument (App. 85-86).

In contrast to the relatively straightforward issues, susceptible of documentary proof, presented in these circumstances, the issues presented in Goldberg stand in stark contrast. There, welfare benefits were terminated because (1) a claimant supposedly "refused to cooperate with [the City] in suing her estranged husband"; and (2) another claimant was denied welfare because he allegedly "refused to accept counseling and rehabilitation for drug addiction." 397 U.S. at 256, n. 2. In these cases, cross-examination of the officials involved is essential and there is every reason to suppose that such testimony is involved in the bulk of welfare termination proceedings.

Here, the issues are far different and more like those at issue in Mitchell v. W. T. Grant Co., supra. There, the court held that no hearing whatsoever need be given the debtor to oppose an initial repossession of property because "the issue turns on the existence of the debt,

the lien, and the delinquency", and "these are ordinarily uncomplicated matters and lend themselves to documentary proof." 42 U.S.L.W. at 4674. The issues presented in a case involving a reduction in survivors' benefits are also likely to be uncomplicated, e.g., the application of a statutory formula, and/or susceptible of documentary proof, e.g., a birth certificate, the earnings record of the decedent. See, also, Richardson v. Perales, supra, 402 U.S. at 407.

In sum, it is clear that the district court erred in holding that the procedures established by the Secretary, affording beneficiaries of survivors' benefits a written hearing prior to reduction of those benefits, are unconstitutional because they provide for a full-scale oral hearing after rather than before the reduction is imposed.

The Secretary, as an impartial adjudicator, has provided for full and complete notice to a beneficiary of a proposed reduction in order to afford the beneficiary an opportunity to respond in writing. Beneficiaries cannot be presumed to lack the ability to take advantage of this opportunity and the issues presented by the proposed reduction are susceptible to an initial determination upon the basis of documentary evidence.

If a beneficiary responds by submitting evidence which casts doubt upon the validity of the reduction, the

reduction is indefinitely postponed pending a determination. If no such evidence is submitted, the reduction is imposed. However, given the absence of need as a factor in determining the right to benefits, the availability of other income and welfare benefits to recipients, the availability of a subsequent full-scale hearing and administrative and judicial review, and the willingness and ability of the Secretary to repay beneficiaries for payments which they did not receive but to which they are entitled, the risk to the beneficiaries that this initial determination may ultimately be deemed erroneous is minimal.

In light of these considerations, under the decisions of the Supreme Court and of this Court, the additional administrative burden and costs which would result if a full-scale hearing were to be required at an initial stage are not constitutionally required.

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed.

Respectfully submitted,

CARLA A. HILLS,
Assistant Attorney General.

DAVID G. TRAGER,
United States Attorney.

WILLIAM KANTER,
DAVID M. COHEN,
Attorneys, Appellate Section
Civil Division
Department of Justice
Washington, D.C. 20530.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 1974, I served the foregoing brief upon counsel for the appellee, by causing copies to be mailed, postage prepaid, to:

Ms. Susan Savitt
Nassau County Law Services
Committee, Inc.
115 North Main Street
Freeport, New York 11520

Ms. Rene H. Reixach
Greater Up-State Law Project
Monroe County Legal Assistance Corp.
139 Troup Street
Rochester, New York 14609

David M. Cohen
DAVID M. COHEN
Attorney.